3

No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER, et al.,
Appellants,

vs.

R. S. MARSHALL, et al.,
Appellees.

BRIEF FOR APPELLEE, EUSTACE CULLINAN.

(Copy of opinion of District Court of Appeal in Lineker v. McColgan, 54 Cal. App. 771, is printed as an appendix to this brief.)

CULLINAN & HICKEY,
Phelan Building, San Francisco,
Solicitors for Appellee, Eustace Cullinan.

No. 4414

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FREDERICK V. LINEKER, et al.,
Appellants,

vs.

R. S. MARSHALL, et al.,
Appellees.

BRIEF FOR APPELLEE, EUSTACE CULLINAN.

So far as the present litigation is against the McColgans and Cullinan, it is a suit:

a. For an accounting of the $14,000 received by D. A. McColgan as a result of the sale on September 2, 1914, under the first deed of trust dated June 20, 1910, raising the issues,

1. Whether McColgan on September 2, 1914, owned the equity in the land and was therefore entitled to the surplus of the $14,000 after satisfying the indebtedness secured by the first deed of trust, and

2. If McColgan did not then own the land what was the amount of the surplus then due to Lineker?

b. To determine whether there was any consideration for the note for $2455 dated September

2, 1914, and the second deed of trust securing it and whether Marshall wrongfully executed it. This necessarily involves the issues:

1. Whether D. A. McColgan actually gave consideration for the second deed of trust and note for $2455, and
2. Whether there was more than that amount owing to Lineker out of the surplus of the $14,000 derived from the sale under the first deed of trust.

c. For a decree that the sale under the second deed of trust was invalid. This depends entirely on the question whether any indebtedness secured by the second deed of trust was due to McColgan when the sale was made; and this in turn depends on the question whether McColgan or Lineker owned the equity in the land and by reason thereof the surplus of the $14,000 derived from the sale under the first deed of trust.

Plaintiffs' entire case depends, therefore, on the question whether or not Lineker or McColgan owned the equity in the land and therefore the surplus of that $14,000 on September 2, 1914, and, incidental thereto, whether or not there was a consideration for the second deed of trust and $2455 note secured by it.

The whole issue indeed, is whether McColgan owed Lineker or Lineker owed McColgan on September 2, 1914, after the sale under the first deed of trust and when the second deed of trust was executed.

If those basic questions of law and fact, which are really identical, have heretofore been litigated between the parties or their privies to a final determination in another action, the defendants' plea of *res adjudicata* must be sustained.

There were two pleas of *res adjudicata* before Judge Rudkin, one based on action No. 5353, Marshall v. McColgan et al., which was tried before Judge Fulkerth in the Superior Court of Stanislaus County, and the other based on action No. 5344, Lineker v. McColgan et al., which was tried before Judge Langdon in the Superior Court of Stanislaus County. In his memorandum opinion sustaining the plea of *res adjudicata* Judge Rudkin refers only to the judgment in action No. 5344, because that was sufficient; but the record in action No. 5353 was also in evidence, and is before the court on this appeal, and that record, quite by itself, is sufficient to support Judge Rudkin's decision from which this appeal is taken.

THE MARSHALL CASE, ACTION NO. 5353.

In their complaint in the case at bar, the Linekers, appellants herein, allege that when the land was sold under the first deed of trust on September 2, 1914, it was bought by R. S. Marshall for $14,000; but they allege that Marshall took the title as representative and trustee of the Linekers. The note for $2455 to Daniel A. McColgan, and the second

deed of trust securing it, both dated September 2, 1914, (after the sale under the first deed of trust) were executed by R. S. Marshall and his wife. In other words, the Linekers, according to their own theory and allegations, selected Marshall to hold the title, execute the note and deed of trust, and deal with the trustees and the lender under the second deed of trust. The defendant, Eustace Cullinan, first came into the transaction when he was named as a trustee in the second deed of trust. There is no suggestion that he, in particular, had any dealings with the Linekers prior to that time or that he knew them in the matter at all. The accountability of the trustees under the second deed of trust was to D. A. McColgan, as lender, and to R. S. Marshall, as borrower. They were not obliged and had no right to look behind Marshall to the Linekers. The judgment in the Marshall case (action No. 5353 before Judge Fulkerth) therefore binds the Linekers as well as Marshall, and to the same extent. If the issues presented by the pleadings in the case at bar were adjudicated as between Marshall and the McColgans and Cullinan in action No. 5353, the judgment in that action bars the Linekers in this case as effectually as if the Linekers themselves had been named as parties in action No. 5353.

Some two years after Marshall had executed the note for $2455 and deed of trust of September 2, 1914, he defaulted and D. A. McColgan, the lender,

demanded that the trustees, as required by the deed of trust, publish a notice and sell the land.

Marshall then commenced action No. 5353 by filing a complaint in which he alleged the execution of the deed of trust of September 2, 1914, and the note for $2455 secured thereby, and demanded an accounting from D. A. McColgan of the amount due, and attacked the consideration of that note, and asked that the sale be restrained until the amount due under the note and deed of trust of September 2, 1914, could be determined. In other words, the fundamental question in action No. 5353 was the same as the fundamental question here; namely, whether there was anything due on the $2455 note of September 2, 1914, at the time when the sale was threatened or made.

That action was tried on its merits before the sale was held.

Judge Fulkerth, after an accounting, adjudged that the amount so determined was secured by the deed of trust, and directed that the trustees proceed with the sale unless the amount so found to be due were paid prior to the sale.

The land was then sold to Peck for the amount so found due which was paid to D. A. McColgan.

In that litigation Marshall attacked the second deed of trust and the $2455 note for a partial failure of consideration. He also alleged that neither he nor his wife had received any consideration.

Proof that there was nothing owing under the second deed of trust, or that it was without consideration, would have sustained his cause of action. He had his day in court. Neither Marshall nor his privies, the Linekers, (whose privity is fully set forth in their own amended complaint herein; see appellants' brief herein at pages 8 and 9 and 20) will be allowed in the case at bar to avoid the conclusive effect of the judgment in action No. 5353 by averring that they did not in the former litigation produce certain evidence or urge certain arguments or grounds of attack which they obviously might have laid before Judge Fulkerth if they had been disposed to do so. The parties to action No. 5353 being in legal contemplation the same as the parties in the case at bar (at least so far as the Linekers, the Marshalls, the McColgans, and Cullinan are concerned) the judgment in the Marshall case operates as an estoppel both as to those grounds grounds which were therein urged and as to those which might have been urged. True, in action No. 5353, Marshall did not urge that by acquiring the Crittenden certificate of purchase McColgan could not become owner of the land adversely to the Linekers and, therefore, that the surplus of the $14,000 belonged to the Linekers and on that account there was no consideration for the $2455 note of September 2, 1914, but there was nothing in the pleadings in the Marshall case to prevent him from so doing.

In *Cromwell v. County of Sac.*, 94 U. S. 351, the court said (pp. 352-353):

> "In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defences actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defences were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defences never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defence actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment,

> cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.
>
> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the findings or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel or a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the injury must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

The doctrine has been re-affirmed as late as November, 1923, in *Myers v. International Trust Co.*, 205 U. S. 64; 44 Supreme Court Reporter 86, and it has not been relaxed or "liberalized" by any of the decisions quoted on pages 52 to 58 of appellants' brief as the most casual inspection of those authorities demonstrates.

Appellants in their brief at page 15 make a false and wholly gratuitous assertion that action No. 5353 was fraudulent and collusive. That action was as genuinely and aggressively litigated as this case has been and there is no warrant for suggesting otherwise. The reason why it was tried five days after it was commenced was that on the day when the order to show cause why a preliminary

injunction restraining the sale should not issue came on for hearing the suggestion was made and adopted that as that hearing involved precisely the same issues and evidence that would be presented later on the trial, and as both parties were as fully prepared as they were ever likely to be, the case should then and there be tried on its merits, so as to avoid a duplication of the work later. Celerity of that kind should be a ground for commendation rather than reproach.

However, no attempt has been made by the Linekers in their pleadings or in their evidence to discredit action No. 5353 as collusive; and, in any event, this court will not in this litigation listen to a collateral attack on the judgment in action No. 5353.

Appellants assert in their brief at page 14, that action No. 5353 "had for its object the defeating of the very purpose of the institution by Lineker himself of action No. 5344". On the contrary, action 5353 by Marshall had the same objective as action No. 5344 by Lineker. Both actions were aimed at preventing the sale and determining what amount, if any, was due on the $2455 note of September 2, 1914. Neither action interfered with the other. Both were actually tried on their merits. The Linekers, in short, have already litigated *twice* the issues which in the case at bar they are seeking to litigate a *third* time. Defendant, Eustace Cullinan, is in this case only as a trustee under the

second deed of trust. With respect to him, and with respect to R. McColgan as trustee under the second deed of trust, the judgment in action No. 5353 is a complete defense to the case at bar. That judgment settled all the questions here involved connected with the second deed of trust, the note for $2455, and the validity of the sale under the second deed of trust.

The case at bar is not a suit for an accounting of the proceeds of the sale under the second deed of trust, for that would be a ratification of the sale. It is a suit to annul that sale and to recover the land on the theory that the sale was invalid because when made there was nothing owing to D. A. McColgan on the $2455 note and the deed of trust securing it.

THE LINEKER CASE, ACTION NO. 5344.

Let us now consider the scope and effect of the judgment in action No. 5344 which was tried before Judge Langdon and in which his judgment was affirmed by the District Court of Appeal in 54 Cal. App. 771. We have printed the opinion of the District Court of Appeal in that case as an appendix to this brief because it contains a clear and succinct statement of the pleadings and issues. From a perusal of that opinion, the court here will see that the issues in the case at bar have been completely adjudicated in action No. 5344.

Some point is made in appellants' brief, at page 17, that in action No. 5344 Frederick V. Lineker alone was a plaintiff and Norvena Lineker, his wife, was not a party, whereas, in the case at bar, both Linekers are parties. On page 17 of appellants' brief, the remark is made that Norvena Lineker's conveyance to Frederick V. Lineker was made on August 18, 1923. That is evidently a typographical error, because on page 6 of appellants' brief, the correct date of the transfer from Norvena Lineker to Frederick V. Lineker—August 18, 1913—is stated. In other words, prior to the commencement of either of the actions pleaded in bar, Norvena Lineker had conveyed the land to her husband, Frederick V. Lineker. Consequently, as she had thus put the title in Frederick V. Lineker and required the world to deal with him as owner, any judgment that binds Frederick V. Lineker binds Norvena Lineker.

Appellants, in their brief, almost concede the correctness of Judge Rudkin's decision sustaining the plea of *res adjudicata*. They say, at page 24, that they admit that a consideration of the pleadings in action No. 5344 "would tend to indicate that a number of the material matters set forth in the amended bill of complaint herein were litigated and passed upon by the Superior Court in action No. 5344", and they "as readily concede that the opinion of the District Court of Appeal in affirming the judgment of the Superior Court tends to support such a conclusion".

They attempt, however, to offset this admission, which they could hardly refuse to make, by the contention that both Judge Langdon, of the Superior Court, and the District Court of Appeal passed upon questions not in issue; and the burden of their contention is that the only isue actually tried and litigated in action No. 5344 was whether Daniel A. McColgan had entered into an *oral* agreement with the Linekers to purchase the Crittenden certificate of sale for the benefit of Lineker himself, and that none of the rights of Norvena was involved in that action.

The question at issue in that case was whether McColgan had acquired Lineker's equity in the land by virtue of the purchase of the Crittenden certificate and the delivery to Daniel A. McColgan of the sheriff's deed for on that question depended the right to any surplus of the $14,000. Lineker, in that action, had two lines of argument and two lines of evidence; one, based on his assertion that D. A. McColgan had made an oral agreement under which he acquired the Crittenden certificate in trust for the Linekers, and the other that under the very terms of the deed of trust, and by virtue of the relationship betwen D. A. McColgan and the Linekers arising out of that deed of trust, he was precluded from acquiring the equity in the land adversely to the Linekers. An examination of the complaint in action No. 5344 contained in Exhibit "A" discloses that in Paragraph II the execution

of the first deed of trust is alleged, and the relation of trustor and beneficiary between Norvena Lineker and her husband, Frederick V. Lineker, as trustor, and Daniel A. McColgan, as beneficiary is set up, and the complaint then recites, in addition to the relation growing out of the deed of trust, the alleged oral agreement concerning the purchase of the Crittenden title.

At the end of Paragraph V of that complaint, in action No. 5344, appears the allegation:

> "That in the purchase of said judgment and certificate of sale last as aforesaid, said defendant, Daniel A. McColgan, well knew that he was acting therein in accordance with his agreement to that end, and *also* that said purchase last aforesaid was made by said defendant, Daniel A. McColgan for the use and benefit of plaintiffs."

Under those allegations Lineker, in that case, based his claim no less on the deed of trust and the relationship between the Linekers and McColgans thereby created than on the alleged oral promise. Counsel for the Linekers in that action laid much stress on the oral promise in order, if possible, to avoid the effect of such authorities as *Phelan v. Demartin,* 47 Fed. 761; *Phelan v. Demartin,* 85 Cal. 365; *Jones on Mortgages,* Vol. 1, Sec. 711; *Copsey v. Sacramento Bank,* 133 Cal. 659, and numerous others, holding that there is no fiduciary relation between the mortgagor and mortgagee, or the trustor and beneficiary, of a deed of trust *as*

such, and no reason why the lender under such instruments may not buy an outstanding title for his own benefit in the absence of fraud, deceit or other inequitable conduct; but counsel for the Linekers, as the briefs at the trial and on appeal in action No. 5344, which are in evidence here, show, insisted at all stages that by the very terms of the deed of trust and by the relationship thereby created, Daniel A. McColgan was precluded from acquiring the Crittenden title, except as trustee for Lineker.

In action No. 5344, as in the case at bar, the basic questions of law and fact were whether Lineker, by reason of his claim of ownership to the equity in the land, was entitled to any balance out of the $14,000 derived from the sale under the first deed of trust and whether there was any consideration for the execution of the second deed of trust and the $2455 note of September 2, 1914. In that case, as in this, the two questions are substantially identical, and fall back on the question whether, after the sale under the first deed of trust, on September 2, 1914, and after the execution of the second deed of trust on the same day, and in view of Daniel A. McColgan's purchase of the Crittenden title, Daniel A. McColgan owed Lineker, or Lineker owed Daniel A. McColgan. The issue, in other words, was not the character of the evidence, whether a written deed of trust or an oral agreement, or the theory, on which Lineker based his claim to the surplus of

the $14,000 and his contention that there was no consideration for the second deed of trust and the $2455 note. The issue was Lineker's right to the surplus of the $14,000 and whether the second deed of trust and the $2455 note were invalid for lack of consideration.

Judge Langdon in action No. 5344, after the first trial, gave a judgment in favor of McColgan. He then granted a new trial which was held. Again Judge Langdon decided in favor of McColgan, and his judgment has been affirmed on appeal. He found all the facts. He decided that McColgan bought the Crittenden title with his own money and for his own benefit, and that he owned the equity in the land at the time of the sale under the first deed of trust; and that McColgan was entitled to the entire $14,000 derived from the sale under the first deed of trust, and that there was a valid consideration for the second deed of trust and the $2455 note; and that there was no oral or other agreement between the McColgans and Lineker creating a trust, and that the execution of the $2455 note on September 2, 1914 was an account stated between Lineker and McColgan as of that date.

Appellants, in their brief, at page 22, remark that the findings of fact in the action No. 5344 were very broad, and were "evidently drawn on behalf of the defendants in a very clearly apparent effort to protect them from every conceivable kind of

future attack in connection with their dealings with the property". The findings follow the pleadings and the evidence directly. Those findings, as the receipt endorsed on them shows, were submitted to counsel for the Linekers ten days or more before they were signed.

The fact that counsel for the McColgans argued in that case that the right of McColgan under the deed of trust to acquire the Crittenden title adversely to Lineker was not involved is immaterial. It did not change the issues, especially since counsel for the Linekers contended that that question was involved, action No. 5344 was tried on the theory that that question was involved, the court held that it was involved, considered the question and decided it against Lineker. The Linekers have had their day in court on that issue. Certainly, a decision the other way would have been binding on the McColgans and Cullinan.

Even when findings are outside the issues as presented by the pleadings, they are proper when the case has been tried on the theory that some vital question not in fact made an issue by the pleadings has nevertheless been made an issue by the introduction of proof addressed thereto.

Howard v. D. W. Hobson Co., 38 Cal. App. 445.

Appellants confuse the theory of their case and the character of the evidence introduced with the issue involved. The issue in action No. 5344 was

not whether Lineker's claim depended on the deed of trust or on the alleged oral contract. It might have depended on both or either. The thing decided was the claim, not the theory or the evidence on which the claim was asserted.

We have seen that Lineker in action No. 5344 did in fact plead and prove the deed of trust and reinforced it with the additional plea of a broken oral promise.

But had he rested his case in action 5344 exclusively on the oral promise, the judgment would, nevertheless, preclude Lineker's litigating here the same issue—his right to the surplus of the $14,000 as owner of the equity in the land and the question whether there was consideration for the second deed of trust and the $2455 note—on another theory or by other evidence.

If Lineker in that case had elected to rest his claim on oral evidence alone, that would have been his privilege. But he could not elect to present that evidence in that case, and reserve other evidence to support the same claim in later litigation in the event that he lost the first case. That, however, is what he here claims the right to do.

A litigant cannot assert a right to a fund, or seek to invalidate an instrument, on one theory or on oral evidence in a particular action, and, when defeated in that litigation, maintain a second action in another forum to establish his right to the fund, or to set aside the instrument, on some dif-

ferent ground or theory which he failed to urge, or on written or other evidence which he failed to present, in the first action.

The principle of *res adjudicata* applies to the fact determined or the principle decided, not to the theory on which the issues were litigated, or the grounds or the evidence on which the questions of fact or law were decided.

As Judge Hawley said in *Stone v. U. S.*, 64 Fed. 667:

> "it is also well settled that the plea of res adjudicata, except in certain special cases, is not only conclusive upon the questions which the courts were required to form an opinion and pronounce judgment on, but upon every point which properly belonged to the subject of litigation, and which was, or might properly have been, brought forward in the former suit. One of the safest rules for courts to follow in determining whether a prior judgment between the same parties, concerning the same matters, is a bar, is to ascertain *whether the same evidence which is necessary to sustain the second action, if it had been given in the former suit, would have authorized a recovery therein.*"
>
> *Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co.*, 55 Fed. 690;
>
> *Cromwell v. Sac. Co.*, 95 U. S. 351-353.

Appellants, on page 37 of their brief, attack finding X (Exhibit "A", page 87) in action No. 5344, which holds that there was an account stated between Frederick V. Lineker and Daniel A. McColgan on September 2, 1914, whereby and where-

from it appears that the sum of $2455 was then due from Lineker to McColgan. Appellants assert that the pleadings in action No. 5344 contain no reference or suggestion relating to any account stated. But on page 20 of their brief, the appellants, reciting the allegations of the complaint in action No. 5344, stated that the complaint alleged that an accounting had been demanded of McColgan which he refused to make, and that the sum of $14,000 received by Daniel A. McColgan from the trustee, which $14,000 was the sum bid by Marshall and paid to Reginald McColgan as trustee, had not all been expended by Daniel A. McColgan in paying the amount due himself or any other lien or liens against the property, and that on the contrary there was then remaining in his hands in excess of $2455 or more than sufficient to satisfy the promissory note secured by the second deed of trust. (Exhibit "A", page 15.) And appellants assert, on page 21 of their brief, that the answer of the McColgans and Cullinan in that case was a specific denial of all the material allegations of the complaint. Indeed, in paragraph IX of their answer in action No. 5344 the McColgans and Cullinan not only denied Lineker's allegation that an accounting had been refused but pleaded specifically that such an accounting had been rendered.

In other words, the question whether or not there had been an accounting of the $14,000 between the McColgans and the Linekers was directly presented

by the pleadings in action No. 5344 and the court found that at the time the note for $2455 and the second deed of trust were executed, said note "was intended by said Frederick V. Lineker and by said Daniel A. McColgan to be, and was in fact, an account stated between" them and "was intended to be, and was in fact, a final accounting * * * of all funds and financial transactions between them up to the time of said execution of said promissory note".

That finding respecting the account stated is by itself conclusive on the question of *res adjudicata.* The case at bar, as we have seen, depends on the question whether after the sale under the first deed of trust, in view of the purchase by McColgan of the Crittenden title, McColgan owed Lineker or Lineker owed McColgan. Incidental to that is the question, whether there was a valid consideration for the second deed of trust and the $2455 note. There is not in this case any suggestion by the Linekers that McColgan did not actually pay a valuable consideration for the note at the time. Their theory is that he had in his hands a balance belonging to Frederick V. Lineker more than sufficient to offset the $2455 note. In other words, their contention is that the $2455 note was paid before it was executed.

Judge Langdon decided in action No. 5344 that the execution of the $2455 note by Marshall at Lineker's request and as Lineker's agent was an

account stated between Lineker and McColgan as of that date.

That finding determines every question of fact or law involved in the case at bar. It determines that there was nothing due to Lineker out of the $14,000 on September 2, 1914, and that there was $2455 due from Lineker to McColgan at the time of the execution of the $2455 note and the second deed of trust on that date.

Appellants devote some pages of their brief to a discussion of the difference in California between a deed of trust and a mortgage and assert that the sheriff's sale on the Crittenden execution conveyed no title because the Linekers, having already conveyed their title in the land to the trustee in the first deed of trust, had no title left on which execution could have been levied. In what respect that discussion is material here we fail to perceive. It amounts to nothing more than a criticism of the correctness of the decision of the District Court of Appeal in action No. 5344, and a play on the phrase "equity of redemption". But we may remark that appellants suffer under a misconception of the nature of a deed of trust. The trustor does not part with all interest in the land when he executes a deed of trust, and the cases quoted by appellants do not so hold. True, when the trustees sell under a deed of trust, the title passes free of subsequent incumbrances. The same thing happens when a mortgage

is foreclosed. But until such a sale the trustor certainly retains an interest on which liens may be imposed, or which he may convey.

A casual glance at the opinion in *Weber v. McCleverty,* 149 Cal. 320, and the other authorities on the same point cited by appellants will disclose that they do not bear out appellants' thesis. They decide merely that a deed of trust is not a "lien" or "encumbrance" within the meaning of Section 1475 of the Code of Civil Procedure which provides that if there be subsisting liens or encumbrances on a homestead the claims secured thereby must be presented to and satisfied out of the debtor's estate before resort is had to the real property covered by the homestead.

The nature of a deed of trust has been described by the Supreme Court of California, in a decision subsequent to *Weber v. McCleverty,* in which the distinction is made between a trust deed, and a deed absolute in form but given really as security. See *McLeod v. Moran,* 153 Cal. 97, in which the court says:

> "A trust-deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property, other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of said

discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere "lien" on the property, it is practically and substantially only a mortgage with power of sale. (See Sacramento Bank v. Alcorn, 121 Cal. 379, 383 (53 Pac. 813); Tyler v. Currier, 147 Cal. 31, 36 (81 Pac. 319); Weber v. McCleverty, 149 Cal. 316, 320 (86 Pac. 706).) The legal title is conveyed solely for the purpose of security, leaving in the *trustor* or his *successors* a *legal* estate in the property, as against all persons except the trustees and those lawfully claiming under them. (Civ. Code, secs. 865, 866.) *Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title.* (King v. Gotz, 70 Cal. 226 (11 Pac. 656).) The *legal estate* thus left in the trustor *or his successors* entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership in regard to the property, subject always of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead. It was expressly held in King v. Gotz, 70 Cal. 236 (11 Pac. 656), that the trustor may select as a homestead property covered by such a trust-deed. The estate of the trustees absolutely ceases upon the payment of the debt (Civ. Code, sec. 871), leaving the whole title in the grantor in whom it was vested at the execution of the trust-deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record of title clear. (Tyler v. Currier, 147 Cal. 31, 36 (81 Pac. 319).)"

Substantially to the same effect are

Tyler v. Currier, 147 Cal. 31;

Duncan v. Wolfer, 39 Cal. App. Dec. 737, 212 Pac. 390;

King v. Gotz, 70 Cal. 236.

That a trustor's interest in land subject to a deed of trust may be taken by execution sale has been expressly held in

Kennedy v. Nunan, 52 Cal. 326.

Sec. 865 of the Civil Code says:

> "The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them."

The $14,000 was the sale price of the land which McColgan (as successor to the Linekers) then owned subject to the first deed of trust. After satisfying the debt secured by that deed of trust, the trustees were bound to pay the balance of the $14,000 to the owner of the land, D. A. McColgan. It has been held expressly that the surplus remaining after sale by trustees in such cases belongs to the successor of the original trustor.

Lineker v. McColgan, 54 Cal. App. 771, 775, in which the court said:

> "On acquiring plaintiff's equity of redemption by the sheriff's deed, Daniel A. McColgan, for the protection of his title so acquired against the intermediate liens, caused the land to be sold under the trust deed. Having acquired the plaintiff's title by the sheriff's deed,

> McColgan was entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled. The question of intermediate lien holders' rights to share in such surplus is not involved in this action."

See, also,

Williams v. Pratt, 10 Cal. App. 625.

But there is no occasion to discuss this question at length, for it was involved and either was or could have been raised in each of the two actions in the state courts where the primary question was the ownership of the surplus remaining of that $14,000 after payment of the indebtedness secured by the deed of trust.

In view of the obvious fact that this suit is barred by the two former judgments, we submit that Judge Rudkin's decision sustaining the plea of *res adjudicata* may be affirmed.

Dated, San Francisco,
March 20, 1925.

Respectfully submitted,
CULLINAN & HICKEY,
Solicitors for Appellee, Eustace Cullinan.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

(Vol. 36 Cal. App. Dec. p. 559)

In the District Court of Appeal
State of California
Third Appellate District

No. 2340

Fred V. Lineker,
Plaintiff and Appellant,
vs.
Adelaide McColgan, administratrix with the will annexed of the estate of Daniel A. McColgan, deceased; R. McColgan, Eustace Cullinan and R. S. Marshall, and Olive H. Marshall (his wife),
Defendants and Respondents.

Opinion

The plaintiff appeals from the judgment herein denying his prayer for an injunction and an accounting.

While the pleadings are complicated and lengthy, covering forty-eight pages of the printed transcript, the facts essential to a correct understanding of the issues raised on appeal may be briefly stated.

The plaintiff was the owner of the land described in the complaint, subject to certain incumbrances in the following order of priority:

1. Trust deed to defendant R. McColgan, as security for payment to defendant Daniel A. McColgan of a promissory note for $2,850 and future advances, executed by plaintiff's wife, Norvena E. S. Lineker, prior to her marriage and while she was owner of the land.

2. Attachment liens aggregating $1,241.09.

3. Judgment lien for $1,264.91.

4. Sheriff's certificate of sale of the land under execution for $1,361.20.

Under the foregoing circumstances, Daniel A. McColgan purchased the sheriff's certificate of sale and, at the expiration of the year allowed for redemption, received and recorded the sheriff's deed to the land. On the day that and after the sheriff's deed was received and recorded, the land was sold under the trust deed to R. S. Marshall for the sum of $14,000. Marshall made the purchase for the use and benefit of the plaintiff pursuant to an agreement between them. In order to make up the purchase price of the land and provide additional money for the plaintiff, Marshall, under agreement with the plaintiff, gave his promissory note to Daniel A. McColgan for the sum of $2,455 and, as security for the payment thereof, conveyed the land to R. McColgan and Eustace Cullinan by trust deed.

The complaint alleges that prior to the sale under the trust deed the plaintiff demanded of Daniel A. McColgan an account of the moneys due thereunder, but that the latter refused to give it; that the certificate of sale was purchased and the sale under the trust deed was had pursuant to an agreement between plaintiff and said McColgan to the effect that out of the proceeds of the sale McColgan was to retain whatever was due him under the trust deed and for the purchase of the certificate of sale and also the amount necessary to satisfy the attachment and judgment liens, if such liens were finally adjudged to be valid, and to account to the plaintiff for the remainder thereof; *that the plaintiff has repeatedly demanded an accounting but that his demands have been refused;* that the whole of the $14,000 was paid to Daniel A. McColgan; that it has not all been consumed "in paying the amount due under the deed of trust * * * or any liens alleged to be subsisting against said real property, but that a large amount of said sum of $14,000 has been retained by said Daniel A. McColgan contrary to and in violation of his agreement with plaintiff, as aforesaid", and that there is justly due plaintiff from said McColgan more than $2,455, the sum for which the second deed of trust was given.

The plaintiff further alleges that the trustees named in the second deed of trust threaten to sell the land thereunder and prays for an injunction to prevent the sale and for an accounting.

The answer denied the alleged agreement between plaintiff and Daniel A. McColgan relative to the purchase of the certificate of sale and the disposition of the proceeds of the sale under the trust deed. At the trial the latter testified that no such agreement was made and that he acquired the land under the sheriff's certificate of purchase and deed for his own use and benefit and that he never agreed to account to plaintiff for the proceeds of the sale. The court found in accordance with such answer and testimony. The court further found that, at the time the note for $2,455 and the second trust deed were executed, such note "was intended by said Fred. V. Lineker and by said Daniel A. McColgan to be and was in fact an account stated between" them and "was intended to be and was in fact a final accounting * * * of all debts and financial transactions between them up to the time of said execution of said promissory note." Since there is evidence to support the findings they are conclusive on appeal.

The trust deed authorized the trustee and Daniel A. McColgan to pay "all or any incumbrance now subsisting, or that may hereafter subsist thereon which may, in their judgment, affect said premises, or these trusts * * * and these trusts shall be and continue as security to the party of the third part * * * for the repayment * * * of all amounts so paid out * * * which disbursement and interest the party of the first part hereby agrees to pay."

The trust deed further provided that, in the event of a sale of the land thereunder, all sums due the third party under its terms should first be paid out of the proceeds and the surplus, if any, should be paid to the first party, or assigns.

Appellant contends that under the foregoing provisions of the trust deed "Daniel A. McColgan could not go out and purchase for his own use and benefit the * * * certificate of sale for the reason that this certificate of sale evidenced a lien subsisting upon the real property affected by said deed of trust * * * being one of the class of liens mentioned in said deed of trust." No authority is cited in support of the contention. Since the lien created by the levy of the execution under which the certificate of sale was issued was junior to that of the trust deed, the provisions of the latter instrument did not authorize the beneficiary thereunder to discharge the former incumbrance and add the amount paid therefor to the indebtedness secured by the trust deed. "A voluntary payment by a mortgagee of claims against the mortgaged property, which it was not necessary for his own protection that he should pay, does not entitle him to be subrogated to the rights of the creditors whose liens he has discharged." (Jones on Mortgages, 7th ed., sec. 878.) "Subrogation is only allowed as a matter of right in such cases, when a party is forced, for the protection of his own interests, to discharge an incumbrance which might otherwise jeopardize

them." (*Carpentier v. Brenham,* 40 Cal. 239.) The trustee and the beneficiary were authorized to pay only such liens "as affect said premises, or these trusts." This language must be interpreted to mean such liens as might affect the rights of the holder of the superior lien. While they were made the judges as to what incumbrances would affect such rights, they were not authorized to decide arbitrarily in disregard of the plain fact that the junior lien could in no manner affect their security.

The relation between a mortgagee and mortgagor is not fiduciary. (*De Martin v. Phelan,* 115 Cal. 538.) Neither is that between the beneficiary under a trust deed and the maker thereof. (*Copsey v. Sacramento Bank,* 133 Cal. 659.) "The acquisition of the equity of redemption by the mortgagee is looked upon with suspicion by the courts, * * * because he has, by reason of his position as creditor, a certain advantage over the mortgagor which may be abused. * * * This objection, however, does not apply with equal force when he purchases the equity of redemption from one who has purchased it of the mortgagor, or when he purchases it at an execution sale had at the instance of a stranger." (Jones on Mortgages, 7th ed., sec. 870.) "A mortgagee in possession does not stand in such a relation of trust or confidence to the mortgagor as that he is prohibited from purchasing, for his own benefit, the title of the latter on an execution sale against him upon a judgment in favor of a third person; and he may set up a title so acquired as a

defense to an action by the mortgagor or his grantee to redeem." (*Ten Eyck v. Craig,* 62 N. Y. 406; *Clark v. Jackson,* [N. H.] 11 Atl. 59.) "The mortgagee in possession may even purchase the equity of redemption at a sale upon an execution in his own favor issued upon a judgment for a debt other than the mortgage debt; and may hold the title adversely to the mortgagor if he does not redeem, as upon a sale upon execution." (Jones on Mortgages, 7th ed., sec. 712; *Trimm v. Marsh,* 54 N. Y. 599, 13 Am. Rep. 623.)

On acquiring plaintiff's equity of redemption by the sheriff's deed, Daniel A. McColgan, for the protection of his title so acquired against the intermediate liens, caused the land to be sold under the trust deed. Having acquired the plaintiff's title by the sheriff's deed, McColgan was entitled to receive and retain for his own use and benefit all the proceeds of the sale under the trust deed above the indebtedness secured thereby to which plaintiff would otherwise have been entitled. The question of intermediate lienholders' rights to share in such surplus is not involved in this action.

The judgment is affirmed.

FINCH, P. J.

We concur:

PREWETT, J. *pro tem.*

BURNETT, J.

Filed October 31, 1921,
John T. Stafford, Clerk.